

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 SHIGE TAKIGUCHI, FUMI NONAKA,) 2:13-cv-01183-JAD-VCF
11 MITSUAKI TAKITA, KAORUKO KOIZUMI,)
12 TATSURO SAKAI, SHIZUKO ISHIMORI,)
13 YOKO HATANO, YUKO NAKAMURA,) ORDER
14 HIDEHITO MIURA, YOSHIKO TAZAKI,)
15 MASAAKI MORIYA, HATSUNE HATANO,)
16 SATORU MORIYA, HIDENAO TAKAMA,)
17 SHIGERU KURISU, SAKA ONO,)
18 KAZUHIRO MATSUMOTO, KAYA)
19 HATANAKA, HIROKA YAMAJIRI,)
20 KIYOHARU YAMAMOTO, JUNKO)
21 YAMAMOTO, KOICHI INOUE, AKIKO)
22 NARUSE, TOSHIMASA NOMURA, and)
23 RITSU YURIKUSA, Individually and)
on Behalf of All Others Similarly)
Situated,)
Plaintiffs,)
vs.)
MRI INTERNATIONAL, INC., EDWIN J.)
FUJINAGA, JUNZO SUZUKI, PAUL)
MUSASHI SUZUKI, LVT, INC., dba)
STERLING ESCROW, and DOES 1-500,)
Defendants.)

Before the court are the defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) (#102, #105). Plaintiffs have responded (#110, #117), and defendants have replied (#113, #122). Defendants Junzo

1 Suzuki, Paul Musashi Suzuki, and Edwin Fujinaga move to dismiss all
2 of plaintiffs' claims against them, and defendant MRI moves to
3 dismiss the securities and intentional fraud claims asserted
4 against it. All moving defendants argue that with respect to
5 plaintiffs' fraud claims - both securities and state - the
6 complaint fails to satisfy the heightened pleading standards of
7 Federal Rule of Civil Procedure 9(b) and the Private Securities
8 Litigation Reform Act ("PSLRA"). All moving defendants also argue
9 that the complaint fails to establish that the purchases and sales
10 at issue were transactions in domestic securities or domestic
11 transactions in other securities and as such plaintiffs' securities
12 claims must be dismissed. Additionally, the Suzuki defendants
13 argue that plaintiffs have not complied with the PSLRA's procedural
14 requirements for pursuing a class action with respect to the
15 securities claims. Plaintiffs oppose the motions but also seek
16 leave to amend their complaint to the extent the court finds it
17 deficiently plead.

18 In considering a motion to dismiss under Rule 12(b) (6), the
19 court must accept as true all material allegations in the complaint
20 as well as all reasonable inferences that may be drawn from such
21 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.
22 2000). The allegations of the complaint also must be construed in
23 the light most favorable to the nonmoving party. *Shwarz v. United*
24 *States*, 234 F.3d 428, 435 (9th Cir. 2000). However, legal
25 conclusions are not entitled to the presumption of truth. *Ashcroft*
26 *v. Iqbal*, 556 U.S. 662, 679 (2009).

27 A complaint "must contain sufficient factual matter . . . to
28 state a claim to relief that is plausible on its face." *Iqbal*, 556

1 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 2 555 (2007)). A claim is plausible on its face "when the plaintiff
 3 pleads factual content that allows the court to draw the reasonable
 4 inference that the defendant is liable for the misconduct alleged."
 5 *Id.* A pleading is insufficient if it offers only labels and
 6 conclusions, a formulaic recitation of the elements of a cause of
 7 action, or "naked assertions devoid of further factual
 8 enhancement." *Id.* (internal punctuation omitted).

9 In alleging fraud, "a party must state with particularity the
 10 circumstances constituting fraud. . . . Malice, intent, knowledge,
 11 and other conditions of a person's mind may be alleged generally."
 12 Fed. R. Civ. P. 9(b). To comply with Rule 9(b), the complaint must
 13 state with particularity the circumstances constituting the fraud,
 14 including an account of the "time, place, and specific content of
 15 the false representations as well as the identities of the parties
 16 to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d
 17 1058, 1066 (9th Cir. 2004). "[A]llegations of fraud must be
 18 'specific enough to give defendants notice of the particular
 19 misconduct which is alleged to constitute the fraud charged so that
 20 they can defend against the charge and not just deny that they have
 21 done anything wrong.'" *Bly-Magee v. California*, 236 F.3d 1014,
 22 1019 (9th Cir. 2001) (internal punctuation omitted). Rule 9(b) is
 23 satisfied if the plaintiff pleads "(i) some of the specific
 24 customers defrauded, (ii) the type of conduct at issue, (iii) the
 25 general time frame in which the conduct occurred, and (iv) why the
 26 conduct was fraudulent." *United States v. Smithkline Beecham*
 27 *Clinical Labs.*, 245 F.3d 1048, 1051 (9th Cir. 2001). Where several
 28 defendants are alleged to be part of the fraud, "Rule 9(b) 'does not

1 allow a complaint to ... lump multiple defendants together but
2 require[s] plaintiffs to differentiate their allegations" as to
3 each defendant. *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir.
4 2011).

5 Plaintiffs' section 10(b) and Rule 10b-5 claim must satisfy
6 not only the Rule 9(b) standard but also the pleading requirements
7 of the PSLRA. *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d
8 694, 701 (9th Cir. 2012). The PSLRA requires "that the complaint
9 plead with particularity both falsity and scienter." *Reese v.*
10 *Malone*, - F.3d -, 2014 WL 555911, at *5 (9th Cir. Feb. 13, 2014).
11 To plead falsity, "the complaint shall specify each statement
12 alleged to have been misleading, the reason or reasons why the
13 statement is misleading, and, if an allegation regarding the
14 statement or omission is made on information and belief, the
15 complaint shall state with particularity all facts on which that
16 belief is formed." 15 U.S.C. § 78u-4(b)(1). "Scienter is defined
17 as 'a mental state embracing intent to deceive, manipulate, or
18 defraud.'" *Id.* at *6. Pleading scienter requires, "with respect
19 to each act or omission alleged to violate this chapter, stat[ing]
20 with particularity facts giving rise to a strong inference that the
21 defendant acted with the required state of mind." 15 U.S.C. §
22 78u-4(b)(2)(A). "A strong inference of scienter 'must be more than
23 merely plausible or reasonable-it must be cogent and at least as
24 compelling as any opposing inference of nonfraudulent intent.'" *Reese*,
25 2014 WL 555911, at *6. "The inference must be that 'the
26 defendant[] made false or misleading statements either
27 intentionally or with deliberate recklessness.' . . . Facts showing
28 mere recklessness or a motive to commit fraud and opportunity to do

1 so provide some reasonable inference of intent, but are not
 2 independently sufficient." *Id.* at *6-7. The court must "review
 3 all the allegations holistically when determining whether scienter
 4 has been sufficiently pled." *Id.* at *7.

5 The court has considered the parties' pleadings and the second
 6 amended complaint filed in this matter and concludes that
 7 plaintiffs' complaint lacks the particularity required to support
 8 the claims of fraud and securities violations, and lacks sufficient
 9 factual allegations with respect to their claims of breach of
 10 fiduciary duty, constructive trust, and any theory of alter ego
 11 liability. Therefore, plaintiffs should be afforded an opportunity
 12 to amend. Plaintiffs shall have to and including May 27, 2014, in
 13 which to file a third amended complaint to allege:

14 1. Facts that allow a plausible inference that the purchases
 15 and sales at issue were "domestic transactions in other
 16 securities."¹ *Morrison v. National Australia Bank Ltd.*, 561 U.S.
 17 247, 130 S. Ct. 2869, 2884 (2010). The complaint should allege
 18 sufficient facts to support a reasonable inference that the
 19 plaintiffs incurred irrevocable liability to take and pay for the
 20 securities in the United States, that the seller(s) incurred
 21 irrevocable liability to deliver the securities in the United
 22 States, and/or that title to the securities was transferred within
 23 the United States. See *Absolute Activist Value Master Fund Ltd. v.*
 24 *Ficeto*, 677 F.3d 60, 67-68 (2d Cir. 2012);

25 2. Any additional facts showing that the plaintiffs'
 26 securities claims are not barred by the relevant statutes of

27
 28 ¹ Plaintiffs appear to admit that the transactions were not in
 securities listed on a domestic exchange.

1 repose;

2 3. As to each defendant, the who, what, when, where, and how
3 of plaintiffs' state law fraud and federal securities claims,
4 specifically: each defendants' knowledge of, involvement in, and/or
5 role in the alleged fraud, what specific misstatements, if any,
6 were made by each defendant, the general time period in which the
7 alleged misrepresentations were made, where the alleged
8 misrepresentations were made, and the manner in which each
9 defendant made alleged misrepresentations to the plaintiffs.

10 Plaintiffs are not, however, required to assert in detail the time,
11 place, and manner in which each of them individually received the
12 alleged misrepresentations;

13 4. Facts showing the statements were false when made, the
14 reasons why they were false, and facts supporting a strong
15 inference that each defendant acted with the requisite scienter;

16 5. Factual allegations supporting a reasonable inference that
17 the Suzuki defendants offered or sold securities to the plaintiffs;

18 6. More than conclusory assertions regarding the Suzuki
19 defendants' ability to control MRI;

20 7. Sufficient factual allegations to support a reasonable
21 inference that there existed either a fiduciary and/or a
22 relationship of special trust between the plaintiffs and the Suzuki
23 defendants; and

24 8. To the extent plaintiffs intend to pursue a theory of alter
25 ego against defendant Fujinaga, sufficient facts to support a
26 reasonable inference that Fujinaga "influenced and governed" MRI,
27 that "[t]here is such unity of interest and ownership that" MRI and
28 Fujinaga "are inseparable from each other," and that "[a]dherence

1 to the corporate fiction of a separate entity would sanction fraud
2 or promote a manifest injustice." Nev. Rev. Stat. § 78.747.

3 Finally, to the extent plaintiffs intend to pursue their
4 complaint as a securities class action, plaintiffs shall fully
5 comply with the procedural requirements for doing so set forth in
6 15 U.S.C. §§ 78u-4(a)(2)(A) and 78u-4(a)(3)(A).

7 The court defers consideration of the plaintiffs' motion for
8 preliminary injunction (#133) until the filing of the third amended
9 complaint and any responses thereto.

10 **IT IS SO ORDERED.**

11 DATED: This 6th day of May, 2014.

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14 UNITED STATES DISTRICT JUDGE
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